

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KRIS MICHAEL ALDRICH,

Defendant-Appellant.

FOR PUBLICATION

May 18, 2001

9:05 a.m.

No. 216402

Saginaw Circuit Court

LC No. 98-015911-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KYALL WILLIAM ALDRICH,

Defendant-Appellant.

No. 216403

Saginaw Circuit Court

LC No. 98-015912-FC

Updated Copy

July 20, 2001

Before: M.J. Kelly, P.J., and Whitbeck and Collins, JJ.

M.J. KELLY, P.J.

Defendants Kris M. Aldrich and Kyall W. Aldrich were originally charged with second-degree murder, MCL 750.317, and, alternatively, with involuntary manslaughter or manslaughter committed with a motor vehicle, MCL 750.321. Following a jury trial, both defendants were convicted of involuntary manslaughter. Kris Aldrich was sentenced as an habitual offender, fourth offense,¹ to fifteen to thirty years' imprisonment. Kyall Aldrich was sentenced as an

¹ MCL 769.12.

habitual offender, third offense,² to fifteen to thirty years' imprisonment. Defendants now appeal as of right. Their appeals have been consolidated for review. We affirm.

I. Facts

Defendants' involuntary manslaughter convictions stem from a two-car collision that occurred during a drag race between defendants, who are brothers,³ on the evening of May 6, 1998. The victim was a fifteen-year-old girl, Jennifer Fear, who was a passenger in Kris Aldrich's vehicle at the time of the collision. The prosecutor's theory of the case was that defendants picked up Jennifer, bought and consumed some whiskey, then went drag racing at speeds up to one hundred miles an hour, when defendant Kris Aldrich, with Jennifer in his vehicle, ran a stop sign and collided with another vehicle, causing Jennifer's death. Counsel for defendant Kris Aldrich conceded that defendants were drinking and engaging in "horseplay," including exceeding the speed limit, but argued that any reckless driving had ended at the time of the accident and that the accident was the result of brake failure. Defendant Kyall Aldrich also claimed that any reckless driving had ceased before the accident.

At trial, many witnesses testified that they observed defendants drag racing down a two-lane stretch of Roosevelt Road on May 6, 1998, at approximately 8:30 p.m. Defendants' vehicles⁴ were racing side by side along Roosevelt Road, thereby occupying the whole roadway including the lane reserved for oncoming traffic. Kris Aldrich's vehicle was occupying the lane reserved for oncoming traffic. Witnesses indicated that the vehicles were traveling "extremely" fast, at speeds approaching ninety miles an hour. Kris Aldrich's vehicle was observed ducking in and out of the oncoming traffic lane to avoid colliding with vehicles traveling in the opposite direction.

The vehicles approached the intersection of Roosevelt and Hemlock.⁵ There is a stop sign at this intersection for vehicles traveling on Roosevelt Road; Hemlock has the right of way. Witnesses testified that the drag race was ongoing as the vehicles approached the intersection. Melissa Musick and her mother, Sherry Musick, were traveling along Hemlock Road approaching the intersection at Roosevelt Road. As they passed through the intersection, Kris Aldrich's Beretta failed to stop at the stop sign and collided with the Musicks' vehicle. The Musicks' vehicle spun out of control "and ended up upside down in the ditch, on fire."⁶ Kris

² MCL 769.11.

³ Kyall was twenty-one years old at the time of the incident in question. Kris, was twenty years old.

⁴ Kris Aldrich was driving a blue Beretta and Kyall Aldrich was driving a red pickup truck.

⁵ This section of Roosevelt is gravel; Hemlock is paved.

⁶ Fortunately, onlookers were able to pull the Musicks from the burning vehicle. The Musicks
(continued...)

Aldrich's vehicle ended up in the field alongside the roadway. Jennifer Fear, the passenger in Kris Aldrich's vehicle, was killed in the accident and her body was found lying outside the Beretta.

Although Kyall Aldrich denied drag racing and told police that he had been driving 1 1/2 miles behind his brother at the time of the accident, witnesses testified that defendants' vehicles were still engaged in the drag race just before the accident. In fact, witness Nicholas Scoles observed defendants' vehicles racing seconds before the accident occurred, just as the vehicles approached the intersection of Hemlock and Roosevelt Roads. Melissa Musick, the driver of the vehicle that collided with Kris Aldrich's vehicle, confirmed that in the seconds before the accident, defendants' vehicles were speeding along the roadway, side by side, although she admitted that Kyall Aldrich's vehicle did not stop at the stop sign.

Kris Aldrich told police at the scene that Jennifer had been driving his vehicle at the time of the accident and that he was sitting in the back seat. He also told police that he could not remember if he had been drag racing. Neither defendant could remember where they were going when the accident occurred.

At trial, Kris Aldrich admitted that beginning around 7:00 p.m. on the night of the incident in question, he, Kyall, and Jennifer had been drinking whiskey mixed with Pepsi. At around 8:30 p.m., the three decided to go to Kyall's house. Kris and Jennifer took the Beretta, with Kris driving, and Kyall drove the red pickup truck. According to Kris, he was driving on Roosevelt at approximately fifty-five or sixty miles an hour. Kris testified that he attempted to pass Kyall's red pickup truck, but pulled back in behind Kyall when another vehicle appeared. Subsequently, Kyall slowed down to approximately twenty miles an hour and signaled for Kris to pull alongside him, and that the two conversed about stopping at a convenience store. Kris stated that he then "took off first and got in front of Kyall's car." Kris testified that as he approached the intersection, at approximately fifty miles an hour, he started to slow down for a stop sign, but that "the brake pedal went right to the floor and wasn't stopping no more." He then entered the intersection and collided with the vehicle being driven by Melissa Musick.⁷

After hearing the above evidence, the jury convicted both defendants of involuntary manslaughter. Defendants received fifteen- to thirty-year sentences. They appeal as of right.

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were then transported to the hospital for treatment.

⁷ The prosecutor presented the rebuttal testimony of Gary Dudicz, an expert in the area of automobile mechanics (including brake systems), who testified that he had examined the Beretta and that the brakes should have been functioning properly at the time of the accident. Dudicz also testified that the vehicle had an adequate supply of brake fluid, that his inspection turned up no leaks, and that the brake pads were fairly new and in good condition.

II. Prosecutorial Misconduct

A. Preservation of the Issue and Standard of Review

This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Concerning preserved issues of prosecutorial misconduct, this Court evaluates the challenged conduct in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Thus, to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings. *Carines*, *supra* at 763-764; *Schutte*, *supra* at 720.

B. Presentation of Deputy Kevin Campbell's Testimony

Defendant Kyall Aldrich argues that it was improper for the prosecutor to present the testimony of Deputy Kevin Campbell because the prosecutor should have known that Deputy Campbell would present invalid information.⁸ Specifically, Kyall points to Deputy Campbell's concession on cross-examination that certain ambiguities attended his speed calculations. Kyall also points to the prosecutor's presentation of Sergeant William Brandt of the Michigan State Police, whose opinions concerning speed contradicted those of Campbell. However, Kyall withdrew his objection to the presentation of Deputy Campbell's testimony because he wanted to refer to Deputy Campbell's speed calculations during closing argument.⁹ He has, therefore, waived this claim of error on appeal. A defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal. *People v Fetterley*, 229 Mich App 511; 583 NW2d 199 (1998).

C. Prosecutor's Duty to Disclose Evidence

After trial had commenced in this matter, Sgt. Brandt generated a statistical report by using the Win Crash computer program. The last page of the report contained an error message, indicating that the results contained in the report were not valid. Sgt. Brandt never provided the prosecutor with a copy of the invalid report.

⁸ Defendant Kris Aldrich does not challenge the prosecution's presentation of Deputy Campbell's testimony on appeal.

⁹ During closing argument, counsel for Kyall Aldrich referred to Deputy Campbell's testimony in arguing to the jury that the prosecution's case was weak.

A prosecutor has a duty to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the offense[.]" MRPC 3.8(d). There is no dispute in this case that any reports or test results prepared for the case by law enforcement officers were subject to discovery. However, Sgt. Brandt's attempt to generate an accurate report in this case was unsuccessful. There is no dispute that the computer printout contained invalid test results and was therefore disregarded by Sgt. Brandt. Hence, it seems the prosecutor's witness did not suppress material evidence. Instead, he disregarded invalid evidence. In any event, we cannot see how defendants were denied a fair trial by the prosecutor's failure to provide them with a report containing invalid information.

D. Closing Argument

Defendants challenge the prosecutor's implication during closing argument that they had sexual designs on the victim on the evening of the incident in question. Defendants did not object to the prosecutor's remarks below. A review of the prosecutor's remarks, in context, reveals that the prosecutor was merely summarizing the facts in evidence and encouraging the jury to draw reasonable inferences from those facts. This was not improper. A prosecutor need not confine argument to the "blandest of all possible terms," but has wide latitude and may argue the evidence and all reasonable inferences from it. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989); *Bahoda, supra* at 282. Because the prosecutor's remarks were not improper, defendants have failed to show plain error affecting their substantial rights. *Carines, supra* at 763-764.

III. Evidentiary Issues

A. Preservation of the Issue and Standard of Review

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). On the basis of the objections made by defendants at trial, it appears, unless indicated later in this opinion, that the evidentiary issues raised by defendants are preserved for appellate review. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), reh den 459 Mich 1203 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

B. Photograph of the Victim and Evidence of the Musicks' Rescue

Defendants claim that the prosecutor's repeated reliance on the photograph of the decedent and reference to the Musicks' burning vehicle and their rescue contributed nothing to the jury's inquiry and served only to prejudice defendants.

At a pretrial hearing regarding the admissibility of evidence of the Musicks' burning vehicle and evidence of heroic rescue efforts by onlookers that resulted in the Musicks being pulled from their burning vehicle, the trial court ruled that the evidence was relevant because it demonstrated the "force and violence" of the collision and could assist the jury in assessing defendants' recklessness in the incident. The court additionally ruled that the probative value of the evidence was not substantially outweighed by any possible prejudice. However, the court cautioned the prosecutor against "overusing" the evidence.

Generally, all relevant evidence is admissible at trial. *Starr, supra* at 497. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. *People v Kozlow*, 38 Mich App 517, 524-525; 196 NW2d 792 (1972). However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. *Sabin, supra* at 57-58.

We agree with the trial court that evidence regarding the condition of the Musicks' vehicle was relevant to the jury's determination of facts at issue in this case such as defendants' recklessness or carelessness and the speed of the vehicles at the time of the impact. Moreover, defendants have not convinced us that the relevancy of the evidence was substantially outweighed by any prejudicial effect or that they were prejudiced by the cumulative nature of the evidence.

With regard to the evidence of the Musicks' rescue from the burning vehicle, a jury is entitled to hear the "complete story" of the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), reh den 454 Mich 1211 (1997); *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). It would have been perplexing to the jury to learn that a violent two-car collision had occurred but not what became of the occupants of one of the vehicles. In any event, defendants have not demonstrated that they were prejudiced by the admission of evidence, from several sources, concerning the Musicks' rescue from their vehicle after the collision. This evidence did not bear on defendants' guilt or innocence.

With regard to Kris Aldrich's unpreserved challenge to the admissibility of the photographs of the victim and Kris' damaged vehicle, we have reviewed the photographs in question and conclude that they are neither shocking nor inherently prejudicial. Nor does it appear from the record that the photographs were offered with the intention of inflaming the jury. *People v Hall*, 83 Mich App 632; 269 NW2d 476 (1978). The photographs were offered to aid

witnesses in their description of the victim's condition at the accident scene as well as the condition of Kris' vehicle after the collision, both matters that were relevant to physical facts. Any prejudice resulting from the use of the photographs did not substantially outweigh their probative value. MRE 403. It appears that the photographs would have aided the jury in explaining and comprehending all circumstances of the incident. See *People v Schmitz*, 231 Mich App 521, 534; 586 NW2d 766 (1998). We find no error in the trial court's admission of the challenged photographs.

IV. Admissibility of Blood Alcohol Test Results

A. Preservation of the Issue and Standard of Review

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *Grant, supra* at 545, 553; *Griffin, supra* at 44. On the basis of the objections made by defendants at trial, it appears unless indicated later in this opinion, that the evidentiary issues raised by defendants are preserved for appellate review.¹⁰ A reviewing court may not disturb a trial court's ruling at a suppression hearing unless that ruling is clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). Where a trial court's decision concerned a mixed question of fact and law, the court's findings are reviewed for clear error, while its application of the law to the facts is reviewed de novo. *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996). Where an evidentiary decision lies within the trial court's discretion, the court's exercise of that discretion is reviewed for an abuse of discretion. *Bahoda, supra* at 288.

B. MCL 257.625a(6)(e)

Defendants raise various claims regarding the admissibility of their blood alcohol test results, including claims of statutory construction involving MCL 257.625a(6)(e). The primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). To determine the Legislature's intent, we first examine the language of the statute. *Id.* "If the language of the statute is unambiguous, the statute should be applied as written and judicial construction is not permitted. However, if the statutory language is ambiguous, a court may go beyond the words of the statute to determine the Legislature's intent." *People v Oliver*, 242 Mich App 92, 96; 617 NW2d 721 (2000).

To the extent that defendants claim that the results of their blood alcohol tests were inadmissible because defendants were not under arrest at the time their blood alcohol levels were

¹⁰ Kris Aldrich moved to suppress the blood alcohol test results on the ground that there was a delay between the accident and the blood alcohol test. Kyall Aldrich argued below that because he was not involved in the accident in question, his blood alcohol test results were inadmissible at trial.

tested, we reject that claim. Section 625a of the Vehicle Code, MCL 257.625a, reads in pertinent part as follows:

(6) The following provisions apply with respect to chemical tests and analysis of a person's blood . . .

* * *

(e) If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol or presence of a controlled substance or both in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution[.]

Our Supreme Court recently ruled that "only persons who have been arrested fall within the purview of the implied consent statute." *Borchard-Ruhland*, *supra* at 285, citing MCL 257.625c and 257.625a(6)(b). However, the Court was construing the provision of the statute that sets forth the presumption of consent to testing, § 625c, and the provision that establishes the notice rights of the suspect, subsection 625a(6)(b), both of which expressly concern only persons who have been "arrested." In contrast, subsection 625a(6)(e) does not mention arrest, and it provides for the admissibility of blood alcohol test results in any "civil or criminal proceeding," where the blood on which the test was run was drawn "for medical treatment" from a driver "involved in" an accident. By its plain terms, therefore, subsection 6(e) concerns tests done on blood drawn not for legal responsibility reasons, but for medical purposes, and is not limited to those under arrest.

Next, defendants claim that their blood alcohol test results were inadmissible under subsection 625a(6)(e) because the prosecutor failed to prove that the blood tests in the instant case were conducted for medical treatment. Defendants failed to raise this issue below. Because they failed to raise the issue at trial, this issue is not preserved for appellate review. *People v Morey*, 230 Mich App 152, 163; 583 NW2d 907 (1998), *aff'd* 461 Mich 325; 603 NW2d 250 (1999). Regardless, it appears from the testimony presented at trial that the medical procedures performed on defendants, including the withdrawing of their blood, were done for medical reasons.¹¹ In any event, even if the trial court erred in admitting the defendants' blood alcohol

¹¹ We note that Kris makes no argument concerning foundational requirements, or the alleged lack thereof, or concerning the lapse of time between the accident and the blood alcohol test, perhaps eschewing those lines of argument in light of *People v Wager*, 460 Mich 118; 594 NW2d 487 (1999), and *People v Campbell*, 236 Mich App 490; 601 NW2d 114 (1999). To the extent
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test results, any error in this regard was harmless in light of the other evidence presented to indicate that defendants had been drinking before the collision, including Kris' own admission that he and Kyall had been drinking whiskey before the crash, and the fact that legal intoxication is not an element of the charges against defendants.

Finally, Kyall claims that because he was not "involved in" the accident, i.e., his vehicle did not come into contact with the Musicks' vehicle, his blood alcohol tests were inadmissible under subsection 625a(6)(e). A similar claim was rejected by this Court in *Oliver, supra* at 96-98. In *Oliver*, the defendant, driving a Jeep Wagoneer, was pushing a small Honda driven by his friend down the westbound lane of US-12. The defendant's Jeep would bump the Honda, which would then coast along for awhile. When the Honda would slow down, the Jeep would again bump the Honda. After being bumped by the Jeep, the Honda driver lost control of the Honda, veered into the path of oncoming traffic, and stuck another vehicle, killing its driver. The defendant stopped off the highway, put his head out of the window, looked back toward the accident, and then drove off, hiding his Jeep behind a friend's shed. He was subsequently discovered and charged with failure to stop at an accident involving serious injury, MCL 257.617.

On appeal, the defendant argued that he was not "involved in" the accident, as required by subsection 617(1), "because his vehicle was not in contact with the Honda when the Honda swerved onto the right shoulder immediately before it veered into the eastbound lane and struck the decedent's vehicle." *Oliver, supra* at 96. This Court rejected the defendant's claim:

[W]e reject defendant's contention that a vehicle cannot be "involved in" an accident if it does not strike or physically touch another automobile. There are no reported cases in this state that construe the phrase "involved in" as it is used in MCL 257.617(1); MSA 9.2317(1). Our construction of that phrase is governed by the rules of statutory construction.

* * *

The phrase "involved in" is not defined in the statute. Therefore, we look to a dictionary for its definition. The relevant dictionary definitions of "involved" include "implicated," and "concerned in some affair, esp. in a way likely to cause danger or unpleasantness." *Random House Webster's College Dictionary* (2d ed, 1997). According to the plain meaning of the term "involved," defendant's conduct falls within MCL 257.617(1); MSA 9.2317(1). The prosecutor presented

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that Kyall claims on appeal that his blood alcohol test was not performed within a reasonable time, we note that our Supreme Court has recently ruled that for purposes of admitting the results of blood alcohol tests performed on a driver, there is no requirement that such tests be given within a reasonable time. *Wager, supra* at 122-124. The delay of approximately 3 1/2 hours between the accident and the test bears on the weight of the evidence, not its admissibility.

evidence that defendant's Jeep pushed the Honda, which could not run on its own power, down the highway at approximately fifty-seven miles an hour. The driver of a vehicle traveling behind defendant's Jeep testified that he witnessed the Jeep strike the rear bumper of the Honda just before the Honda began to veer off the road and out of control. Alexander testified that it was the impact of defendant's Jeep that caused him to begin to lose control of the Honda.

The evidence indicated that defendant clearly played a part in the accident despite the fact that his vehicle did not strike or come into contact with another vehicle. We conclude that defendant was "involved in" the accident because the evidence demonstrated that he was implicated in or connected with the accident in a logical or substantial manner Defendant need not have caused the accident in order to have been "involved in" the accident. [*Oliver, supra* at 96-98 (citations omitted).]

Although the *Oliver* Court construed the phrase "involved in" contained in another provision of the Vehicle Code, the statute addressing the failure to stop at a serious injury accident, MCL 257.617(1), the reasoning and analysis contained in *Oliver* applies with equal force to the term "involved in" contained in subsection 625a(6)(e). We, therefore, adopt the *Oliver* Court's analysis.¹² Like the defendant in *Oliver*, Kyall Aldrich in this case clearly played a part in the accident at issue despite the fact that his vehicle did not strike or come into contact with the Musicks' vehicle. The prosecutor presented evidence to indicate that in the seconds before the accident, defendants' vehicles continued to be engaged in a high-speed drag race. In fact, in the seconds before the collision, defendants' vehicles were speeding along side by side down Roosevelt Road, thereby occupying the whole roadway including the lane reserved for oncoming traffic. Even though Kyall's vehicle did stop at the stop sign at the intersection of Roosevelt and Hemlock Roads, he was involved in the accident because his conduct was connected to the accident in a natural and logical manner. In fact, had defendants not been

¹² We acknowledge the holding in *Robinson v Detroit*, 462 Mich 439, 456-457, 468; 613 NW2d 307 (2000), *reh den* 463 Mich 1211 (2000). In *Robinson*, a case involving liability for injuries sustained as a result of a police chase of a fleeing vehicle, our Supreme Court construed the motor vehicle exception to governmental immunity, MCL 691.1405. The motor vehicle exception requires that a plaintiff's injuries "result from" the negligent operation of a government vehicle. The *Robinson* Court, without much elaboration, determined that the plaintiffs could not satisfy the "resulting from" language of the statute "where the pursuing police vehicle did not hit the fleeing car or otherwise physically force it off the road into another vehicle or object." *Robinson, supra* at 456-457, 468. *Robinson* is distinguishable from the present case. The *Robinson* decision narrowly construed the motor vehicle exception to governmental immunity and involved police chases of fleeing vehicles and the issue of liability for injuries that resulted. Here, the issue is whether, under the Vehicle Code, Kyall was "involved in" an accident even though his vehicle did not come into contact with the Musicks' vehicle. For the reasons set forth above, we believe that Kyall was "involved in" the accident. *Oliver, supra* at 96-98.

engaged in a high-speed drag race, this accident would never have occurred. In light of the *Oliver* decision, Kyall's claim that he was not involved in the accident must fail.

V. Directed Verdict

A. Preservation of The Issue and Standard of Review

At the close of the prosecution's case, defendants moved for directed verdicts on the second-degree murder charges, thus preserving this issue for appellate review. When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999).

B. Second-Degree Murder

The offense of second-degree murder consists of the following elements: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Id.*, quoting *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Defendants claim that there was insufficient evidence regarding the element of malice. The element of malice is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464; *Mayhew, supra* at 125. Malice for second-degree murder can be inferred from evidence that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). The offense of second-degree murder "does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences." *Mayhew, supra* at 125. See also *Goecke, supra* at 466.

Here, there was evidence to indicate that defendants intentionally committed an act, drag racing at very high speeds into an intersection while intoxicated, that was in disregard of life-endangering consequences and that was in "wanton and wilful disregard of the likelihood that the natural tendency of such behavior [was] to cause death or great bodily harm." *Id.* at 464; *Mayhew, supra* at 125. See also *People v Vasquez*, 129 Mich App 691, 694; 341 NW2d 873 (1983). Although Kyall claims that he had ceased any reckless driving before the accident, the prosecutor presented evidence to indicate that the drag race continued up until seconds before the crash. It is the province of the jury to determine questions of fact and assess the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Because there was evidence to infer the element of malice with regard to both defendants, the question was one for the jury. *Mayhew, supra* at 126.

In sum, viewing the evidence in a light most favorable to the prosecution, as we are constrained to do in this context, we believe that the evidence was sufficient for a rational trier of

fact to find that the essential elements of second-degree murder, including malice, were proved beyond a reasonable doubt. *Id.*

VI. Jury Instructions

A. Preservation of The Issue and Standard of Review

We review jury instructions in their entirety to determine if error requiring reversal occurred. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). The instructions must not be "extracted piecemeal to establish error." *Id.*, quoting *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Brown, supra* at 746. Defendants' claims of instructional error are, for the most part, preserved for appellate review. With regard to unpreserved claims of instructional error, this Court reviews such claims for plain error that affected substantial rights. *Carines, supra* at 761-764, 774; *Snider, supra* at 420.

B. Alleged Instructional Errors

Defendants first claim that the trial court should have given their requested, modified abandonment instruction. We have reviewed the instructions in their entirety and conclude that the instructions given by the trial court substantially covered the instruction requested by defendants and the trial court's failure to give the abandonment instruction did not seriously impair defendants' ability to effectively present a given defense. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

With regard to Kris' claim that because there was evidence that he failed to stop at the stop sign because of brake failure, the trial court should have instructed the jury on intervening cause. Kris did not request such an instruction below and has not shown that the trial court's failure to give such an instruction amounted to plain error affecting Kris' substantial rights. *Carines, supra* at 761-764, 774. With regard to Kyall's claim that the trial court erred in failing to give his requested instruction on intervening cause, the instructions given adequately covered the substance of the instruction requested by Kyall. The trial court's instruction that Kyall's mere presence was not enough to implicate him in the crime, and that his responsibility for the victim's death required that it have resulted from "common" unlawful activity accompanied by the required intent element, covered the defense theory that Kyall was not participating in a drag race at the time of the fatal collision.

Having reviewed the jury instructions in their entirety, we do not believe that Kyall was prejudiced by the trial court's failure to instruct the jury on the uncharged offense of furnishing alcohol to a minor.

VII. Sentencing

Lastly, Kris Aldrich argues that his sentence for involuntary manslaughter is excessive. Provided that permissible factors are considered, appellate review of prison sentences is limited to whether the sentencing court abused its discretion. *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), overruled in part on other grounds, *People v Milbourn*, 435 Mich 630; 461

NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Milbourn, supra* at 635-636, 654. The senseless crime in this case resulted in the death of a fifteen-year-old girl. Defendant, therefore, committed a very serious offense. Moreover, defendant had a rather extensive criminal history for a twenty-year-old man. Under these circumstances, the sentence imposed for involuntary manslaughter, fifteen to thirty years, is proportionate to the seriousness of the crime and to defendant's prior record.

VIII. Conclusion

Having found no error requiring reversal, we conclude that defendants' convictions and sentences must be affirmed.

Collins, J., concurred.

/s/ Michael J. Kelly

/s/ Jeffrey G. Collins